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May 15, 2012

The Honorable Debbie Stabenow
Chairman
The Honorable Pat Roberts
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable Frank D. Lucas
Chairman
The Honorable Collin C. Peterson
Ranking Member
Committee on Agriculture
House of Representatives

Subject: *Department of Agriculture, Food and Nutrition Service: Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Agriculture, Food and Nutrition Service (FNS), entitled "Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010" (RIN: 0584-AE15). We received the rule on April 30, 2012. It was published in the *Federal Register* as an interim final rule on April 27, 2012, with an effective date of July 1, 2012. 77 Fed. Reg. 25,024.

The interim final rule amends National School Lunch Program (NSLP) regulations to conform to requirements contained in the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) regarding performance-based cash assistance for school food authorities certified compliant with meal pattern and nutrition standards. The interim rule requires state agencies to certify participating school food authorities (SFAs) that are in compliance with meal pattern and nutrition standard requirements as eligible to receive performance-based cash assistance for each reimbursable lunch served (an additional six cents per lunch available beginning October 1, 2012, and adjusted annually thereafter). The interim rule also requires state agencies to disburse performance-based cash assistance to certified SFAs, and withhold the

performance-based cash assistance if the SFA is determined to be out of compliance with meal pattern or nutrition standards during a subsequent administrative review. The intended effect of the interim rule is to provide additional funding for SFAs to implement new meal pattern requirements, thus increasing the healthfulness of meals served to school children.

Enclosed is our assessment of FNS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that FNS complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Lynnette Williams
Acting Branch Chief
Planning and Regulatory Affairs Branch
Department of Agriculture

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF AGRICULTURE,
FOOD AND NUTRITION SERVICE
ENTITLED
"CERTIFICATION OF COMPLIANCE WITH MEAL REQUIREMENTS
FOR THE NATIONAL SCHOOL LUNCH PROGRAM UNDER
THE HEALTHY, HUNGER-FREE KIDS ACT OF 2010"
(RIN: 0584-AE15)

(i) Cost-benefit analysis

FNS states, that as required for all rules that have been designated significant by the Office of Management and Budget (OMB), a Regulatory Impact Analysis (RIA) was developed for this interim rule. FNS notes that the interim rule establishes procedures that will result in a transfer from the federal government to SFAs of as much as \$1.4 billion through FY 2016 to implement improved NSLP and School Breakfast Program (SBP) meal patterns that are more fully aligned with the *Dietary Guidelines for Americans*. FNS explains that the 2010 Dietary Guidelines Advisory Committee emphasizes the importance of a diet consistent with DGA recommendations as a contributing factor to overall health and a reduced risk of chronic disease. According to FNS, the new meal patterns are intended not only to improve the quality of meals consumed at school, but to encourage healthy eating habits generally and those goals are furthered by the funding made available by this interim rule.

In addition to the estimated \$1.4 billion 5-year transfer from the federal government to SFAs in NSLP meal reimbursements, FNS states that SFAs will incur some minor costs to prepare materials to document and certify their compliance with the new meals patterns. Additionally, FNS notes that state agencies will incur costs to review that documentation, make certification decisions, conduct on-site SFA verification reviews, and provide technical assistance to the SFAs. Through FY 2016, FNS expects these administrative functions to cost \$3.7 million. Finally, FNS states that the interim rule provides for an additional \$100 million over fiscal years 2012 and 2013 to fund technical assistance, oversight, monitoring, and certification activity by the states.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

FNS states that the interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. §§ 601–612). Pursuant to that

review, FNS determined that this rule will not have a significant impact on a substantial number of small entities. FNS notes that while there may be some SFA burden associated with initial certification for the performance-based reimbursement in this rule, the burdens will not be significant and will be outweighed by the benefits of increased federal reimbursement for school lunches.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. §§ 1532-1535

FNS states that the interim rule does not contain federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on state, local, or tribal governments or to the private sector of \$100 million or more in any one year, and, therefore, are not subject to the requirements of sections 202 and 205 of UMRA.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

FNS, under the provisions of the Administrative Procedure Act at 5 U.S.C. § 553(b)(B), finds for good cause that use of prior notice and comment procedures for issuing this interim rule is impracticable. FNS states that section 201 of HHFKA, requires provision of the performance-based reimbursement to SFAs determined to be eligible beginning on October 1, 2012. Because the provision of performance-based reimbursement is dependent on the publication and implementation of the final meal pattern requirements, FNS concludes that there is insufficient time to issue both a proposed rule and final rule prior to the statutory implementation deadline. As a result, FNS believes that the interim rule is necessary to comply with the requirements of section 201 of HHFKA and ensure that those provisions are implemented and effected by state agencies and SFAs by October 1, 2012.

FNS invites public comment on this interim rule, and will consider amendments to the interim rule based on comments submitted during the 90-day comment period. FNS will address comments and affirm or amend the interim rule in a final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The Paperwork Reduction Act of 1995 requires that OMB approve all collections of information by a federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. FNS states that this is a new collection and the new provisions in this rule, which will increase burden hours, affect the information collection requirements that will be merged into the National School Lunch Program, OMB Control Number 0584-0006, which expires May 31, 2012. FNS states that the current collection burden inventory for the National

School Lunch Program is 12,654,440, and these changes are contingent upon OMB approval under the Paperwork Reduction Act of 1995. When the information collection requirements have been approved, FNS will publish a separate action in the *Federal Register* announcing OMB's approval. FNS must receive comments on the information collection in the interim rule by June 26, 2012.

Statutory authorization for the rule

FNS states that the authority for the interim rule is based on 42 U.S.C. §§ 1751–1760, 1779.

Executive Order No. 12,866 (Regulatory Planning and Review)

FNS states that the interim rule has been designated an “economically significant regulatory action” and, accordingly, has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

Executive Order 13,132 requires federal agencies to consider the impact of their regulatory actions on state and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13,132. FNS has considered the impact of this interim rule on state and local program operators and has attempted to develop a rule that would implement the performance-based reimbursement in the most effective and least burdensome manner. FNS recognizes that implementing the new performance-based reimbursement certification process will require a significant effort on the part of state and local program operators. To ensure state agencies conduct performance-based funding requirements and provide SFAs with the training and technical assistance needed to implement the improved school meal patterns, FNS has reduced the administrative review requirements for the 2012–2013 school year. Per the requirements of HHFKA, FNS will provide \$47 million to states for each of the two years to assist with meal pattern implementation, training, technical assistance, and performance-based certification activities. FNS is also exploring additional approaches to alleviate program operators' administrative burden, including support for implementation and certification activities.